

MF 02-11

Tax Type: Motor Fuel Use Tax

Issue: Dyed/Undyed Diesel Fuel (Off Road Usage)

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**ABC EXCAVATION AND
BLACKTOP GROUP,
Taxpayer**

No. 02-ST-0000
FEIN 00-0000000
Motor Fuel Tax Refund Claims
Periods 1/01 – 6/01, 7/01 – 12/01

Ted Sherrod

**Administrative Law
Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Gary Stutland on behalf of the Illinois Department of Revenue; Joel A. Deurmier, *pro se*, on behalf of ABC Excavation and Blacktop Group.

Synopsis:

This matter has arisen as the result of a protest by ABC Excavation and Blacktop Group (hereinafter referred to as “taxpayer”) of the denial of the taxpayer’s claims for refund of motor fuel tax paid on fuel used in excavating, grading and other equipment. The taxpayer’s claims cover the period January 1, 2001 through June 30, 2001, and the period July 1, 2001 through December 31, 2001. The taxpayer timely protested the Department of Revenue’s (“Department”) denial of its claims. A hearing on the

taxpayer's protest was held on August 15, 2002. During the hearing, the taxpayer acknowledged that it is not contesting the Department's denial of that portion of the taxpayer's refund claim covering the period July 1, 2001 through December 31, 2001 exceeding \$2,499.99. Following a review of the testimony and documents of record, it is recommended that this matter be decided in favor of the Department.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the Department's denial of the taxpayer's claims for refund of Illinois Motor Fuel Tax for the periods covering January, 2001 through June, 2001, and July, 2001 through December, 2001. Department Group Ex. 1.
2. The taxpayer is not contesting the Department's determination denying a refund for the period covering July 1, 2001 through December 31, 2001 for claimed amounts exceeding \$2,499.99 . Tr. pp. 28, 29.
3. Taxpayer is a water and sewer construction company that operates within a 50 mile radius of its office located in Anywhere, Illinois. Department Group Ex. 1.
4. Taxpayer purchased, and paid tax on, undyed diesel fuel for use in excavating, grading and other equipment, which it operated on the highway and used off the highway during the tax period in controversy; however, the taxpayer did not purchase dyed diesel fuel during this tax period. Tr. pp. 10, 11, 20, 23, 24; Department Group Ex. 1.
5. The taxpayer did not purchase dyed diesel fuel because the cost of building a dyed diesel fuel storage facility would have exceeded \$50,000. Tr. pp. 14, 15, 16, 24; Taxpayer's Ex. 3.

6. Taxpayer filed claims for refund for the tax it paid when purchasing undyed diesel fuel for purposes other than operating a motor vehicle upon public highways or waterways. Department Group Ex. 1.¹

Conclusions of Law:

Section 2 of the Illinois Motor Fuel Tax Act (“IMFTA”) imposes a tax on “... the privilege of operating motor vehicles upon the public highways and recreational-type watercraft upon the waters of this State.” 35 ILCS 505/2. Tax is measured by the number of gallons used (35 ILCS 505/2), and is to be collected by licensed receivers, distributors or suppliers, or paid directly by others. 35 ILCS 505/5, 35 ILCS 505/5a, 35 ILCS 505/6, 35 ILCS 505/6a, 35 ILCS 505/7, 35 ILCS 505/7b. Certain types of special fuels purchased for off-highway use are exempt from tax. 35 ILCS 505/13. Specifically, section 4d of the IMFTA provides that “(A)ll special fuels sold or used for non-highway purposes must contain only the dye Solvent Red 164” 35 ILCS 505/4d. Section 13 of the IMFTA, 35 ILCS 505/13, (hereinafter “section 13”) provides that “(N)o claim based upon the use of undyed diesel fuel shall be allowed except for undyed diesel fuel used by a commercial vehicle, as that term is defined in Section 1-111.8 of the Illinois Vehicle Code” 35 ILCS 505/13.² The issue in this case is whether the taxpayer is

¹ Section 13 of the Illinois Motor Fuel Tax Act, 35 ILCS 505/13 provides in part that: “(A)ny person other than a distributor or supplier, who loses motor fuel through any cause or uses motor fuel (upon which he has paid the amount required to be collected under Section 2 of this Act) for any purpose other than operating a motor vehicle upon the public highways or waters, shall be reimbursed and repaid the amount so paid.”

² Section 1-111.8 of the Illinois Vehicle Code, 625 ILCS 5/1-100 *et seq.* defines a commercial vehicle as “(A)ny vehicle operated for the transportation of persons or property in the furtherance of any commercial or industrial enterprise, For-Hire or Not-For-Hire, but not including a commuter van, a vehicle used in a ridesharing arrangement when being used for that purpose, or a recreational vehicle not being used commercially.” 625 ILCS 5/1-111.8.

entitled to a refund for undyed motor fuel used in off-highway vehicles pursuant to section 13.

Section 21 of the IMFTA, 35 **ILCS** 505/21, incorporates various sections of the Retailers' Occupation Tax Act ("ROTA"), 35 **ILCS** 120/1 *et seq.* Among those sections is ROTA § 6b, which provides in part:

As soon as practicable after a claim for credit or refund is filed, the Department shall examine the same and determine the amount of credit or refund to which the claimant or the taxpayer's legal representative ... is entitled and shall, by its Notice of Tentative Determination of Claim, notify the claimant or his legal representative of such determination, which determination shall be prima facie correct. Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy of the Department's record relating thereto, in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the Department's determination, as shown therein.

35 **ILCS** 120/6b

In this case, the Department has introduced into the record its denial of the taxpayer's claims for refund under the certificate of the Director. Department Group Ex. 1. Pursuant to § 21 of the IMFTA, that determination is prima facie correct. 35 **ILCS** 505/21.

The Department's case is a rebuttable presumption. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157 (1968); Du Page Liquor Store v. McKibbin, 383 Ill. 276, 279 (1943). A taxpayer cannot overcome the presumption merely by denying the accuracy of the Department's determination. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833 (1st Dist. 1988). Instead, a taxpayer has the burden to present evidence that is consistent, probable and closely identified with its books and

records, to show that the determination is not correct. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 333 (1958); A.R. Barnes & Co., supra. Oral testimony without corroborating books and records is insufficient to overcome the Department's prima facie case. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991).

Moreover, in this case the taxpayer is seeking an exemption from the motor fuel tax. It is well settled in Illinois that a statute exempting property or an entity from taxation must be strictly construed against exemption, with all facts construed and debatable questions resolved in favor of taxation. People ex rel. Nordlund v. Home for the Aged, 40 Ill. 2d 91 (1968); Gas Research Institute v. Department of Revenue, 154 Ill. App. 3d 430 (1st Dist. 1987). Based on these rules of construction, the Illinois courts have placed the burden of proof on the party seeking exemption and have required such party to prove by clear and convincing evidence that it falls within the appropriate statutory exemption. Metropolitan Sanitary District of Greater Chicago v. Roswell, 133 Ill. App. 3d 153, 155 (1st Dist. 1985) (“ ... the burden is on the party seeking the exemption to clearly and convincingly prove that it is within the contemplation of the statute”). For the reasons enumerated below, I conclude that the taxpayer has not borne its burden of proof in this case, and has failed to present clear and convincing evidence that it is entitled to an exemption from the IMFTA.

The only documentary evidence admitted into the record by the taxpayer was an estimate of costs to obtain a storage facility for dyed fuel, and excerpts from the IMFTA. The taxpayer introduced no evidence to show that the excavating, grading and other equipment identified in the taxpayer's refund claims, in which the taxpayer used undyed

diesel fuel were commercial vehicles. It was incumbent upon the taxpayer to do so because, as noted above, section 13 limits refund claims for the use of undyed diesel fuel to commercial vehicles. Beginning January 1, 2000, all diesel fuel to be sold or used tax-free in Illinois by non-commercial vehicles for off highway purposes must be dyed diesel fuel. 35 ILCS 505/4d; 35 ILCS 505/13. Since the taxpayer has not shown that the vehicles in controversy were commercial vehicles, the taxpayer has failed to rebut the Department's prima facie case. In sum, the taxpayer has failed to show that it meets all of the criteria enumerated in section 13 of the IMFTA for the allowance of the refunds the taxpayer seeks.

The taxpayer's primary argument is that it is not economically feasible for it to purchase dyed fuel for its business. Tr. pp. 14, 15, 16, 17, 18, 19, 23, 24; Taxpayer's Ex. 3. The record shows that the cost of installing storage tanks for dyed diesel fuel would amount to more than \$50,000 (Taxpayer's Ex. 3), and presumably exceed any tax savings the taxpayer would realize by complying with the requirements of 35 ILCS 505/4d. Because of these compliance costs, the taxpayer argues that the legislature could not have intended to restrict refunds for the use of diesel fuel in off highway vehicles in the manner the Department claims when it amended the IMFTA effective January 1, 2000.³

Public Act 91-173, effective January 1, 2000 (see P.A. 91-173, § 99), significantly changed the IMFTA. In doing so, it appears that the legislature may have failed to consider certain practical problems presented by the new requirement that dyed diesel

³ Public Act 91-173, which became effective January 1, 2000 (see P.A. 91-173, § 99), added a new section to the Illinois Motor Fuel Tax Act. See Public Act 91-173, § 5. This section provides in part that: "(A)ll special fuel sold or used for non-highway purposes must contain only the dye Solvent Red 164 The dye must be added prior to the removal from a terminal rack. The Department may also require all special fuel for non-highway use to have a marker added."

fuel be used in non-commercial off-highway vehicles, to qualify for exemption. However, this tribunal is obliged to administer and enforce the IMFTA's clear provisions as written. It cannot ignore them based on the legislature's perceived intent in enacting the laws being applied when the language of the statute is clear and unambiguous. People v. West Side Trust & Savings Bank, 362 Ill. 607 (1936); People ex rel. Blome et al v. Nudelman, Director of Finance, et al, 373 Ill. 220, 226 (1940) ("A statute itself affords the best means of its exposition, and if the legislative intent can be ascertained from its provisions that intent will prevail without resorting to other aids for construction"). Thus, the taxpayer's petitions for relief from the new compliance burdens imposed in 2000 by P.A. 91-173, § 5 must be addressed to the legislature rather than the courts, since this tribunal has no power to contravene the legislature's clear and unmistakable intent.

During the hearing, the taxpayer correctly pointed out that it is an off-highway user of motor fuel and that other off-highway users are exempt from tax on the motor fuel they use. See 35 **ILCS** 505/13. Tr. pp. 22, 23. It contends that not allowing it to take an exemption for the off-highway use of motor fuel, while affording this exemption to other off-highway users is discriminatory. However, this argument ignores the fact that no off-highway user of undyed diesel fuel in non-commercial vehicles, a category the taxpayer has failed to show does not include it, is allowed a refund for the cost of motor fuel it uses. Allowing a refund to the taxpayer while disallowing it to all other off highway users of undyed diesel fuel in non-commercial vehicles would discriminate in favor of the taxpayer in violation of the U.S. Constitution. See Kerasotes Rialto Theater Corporation v. City of Peoria, 77 Ill. 2d 491 (1979).

As noted above, the taxpayer is not contesting the Department's denial of the taxpayer's refund claim for the tax period July 1, 2001 through December 31, 2001 exceeding \$2,499.99. Accordingly, both of the taxpayer's claims are for amounts of less than \$2,500.

WHEREFORE, for the reasons stated above, it is my recommendation that the Department's denial of the taxpayers' claims for refund for the periods January 1, 2001 through June 30, 2001, and July 1, 2001 through December 31, 2001 be upheld.

Ted Sherrod
Administrative Law Judge

Date: October 4, 2002